# Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING UP NO D2–28–828 OF 1999
ABDUL AZIZ J
14 APRIL 1999

***Companies and Corporations*** — *Petition — Substitution of petitioning creditor — Application to defer withdrawal of petition — Whether should be allowed — Companies (Winding-Up) Rules 1972 r 33(1)*

This was an application by Cutler-Hammer Controls Sdn Bhd ('Cutler-Hammer') to have the withdrawal of the winding-up petition against the respondent company deferred. The original petitioner had expressed a wish to withdraw the petition and Cutler-Hammer expressed their desire to be substituted as petitioner. As at the date of the application, Cutler-Hammer had yet to issue against the respondent company a statutory notice under s 218(2)(a) of the Companies Act 1965.

**Held**, dismissing the application:
The words 'would have' in r 33(1) of the Companies (Winding-Up) Rules 1972 does not indicate future qualification and does not justify deferment of the making of an order to withdraw a winding-up petition to enable an intending petitioner to show that the requirements of s 218(2)(a) of the Companies Act 1965 have been satisfied (see p 532D–H).

**[Bahasa Malaysia summary**

Ini adalah permohonan oleh Cutler-Hammer Controls Sdn Bhd ('Cutler-Hammer') untuk penarikan petisyen penggulungan terhadap syarikat responden ditangguhkan. Pempetisyen yang asal telah mengemukakan hasrat untuk diganti sebagai pempetisyen. Pada hari permohonan tersebut, Cutler-Hammer belum lagi mengeluarkan terhadap syarikat responden tersebut satu notis statutori di bawah s 218(2)(a) Akta Syarikat 1965.

**Diputuskan**, membatalkan permohonan:

Perkataan 'sepatutnya mempunyai' di dalam k 33(1) Kaedah (Penggulungan) Syarikat 1972 tidak menunjukkan syarat di masa hadapan dan tidak menjustifikasikan penangguhan dalam membuat perintah untuk menarik balik petisyen penggulungan untuk membolehkan pempetisyen yang berkeinginan untuk menunjukkan bahawa keperluan s 218(2)(a) Akta Syarikat 1965 telah dipuaskan (lihat ms 532D–H)].

**Notes**

For a case on substitution of petitioning creditor, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 534.

**Cases referred to**

*Perak Pioneer Ltd v Petroliam Nasional Bhd* [1986] 3 WLR 105

**Legislation referred to**

Companies (Winding-up) Rules 1972 r 33(1)
Companies Act 1965 s 218(2)(a)
Companies (Winding-up) Rules r 33(1) [HK]

*LH Saw* (*Saw & Co*) for the petitioner.
*Namasivayam Ramesh* (*Ramesh & Co*) for the respondent.
*LH Liew* (*Shearn Delamore & Co*) for the creditor.

*Cur Adv Vult*

**Abdul Aziz J**: On 9 April 1999, the petitioner company expressed a wish to withdraw this petition, whereupon Cutler-Hammer Controls Sdn Bhd ('Cutler-Hammer') expressed their desire to be substituted as petitioner.

According to r 33(1) of the Companies (Winding-Up) Rules 1972, where a petitioner, among other things, 'consents to withdraw his petition ... the Court may upon such terms as it thinks just substitute as petitioner any person who, in the opinion of the court, would have a right to present the petition and who is desirous of proceeding with the petition'.

The question that has arisen is whether Cutler-Hammer is a 'person who ... would have a right to present the petition'. It arose from the circumstances that on 9 April learned counsel for the respondent company informed the court that Cutler-Hammer had not yet issued against the respondent company a statutory notice under s 218(2)(a) of the Companies Act 1965 and on 12 April learned counsel for Cutler-Hammer confirmed that such was the case and that their petition would be dependent on the presumption under that section as to the inability of the respondent company to pay their debts. I had indicated that if substitution was to be ordered it would have to be on a written application, but that if, on the position as ascertained from the bar, Cutler-Hammer would not presently be qualified to be substituted, then I ought straight away to disregard their desire and proceed to give effect to the intended withdrawal of this petition unless some other party should desire substitution.

Learned counsel for Cutler-Hammer urged the court to defer making an order on the intended withdrawal of this petition until that company should be in a position to show that the requirements of s 218(2)(a) for the presumption to arise have been satisfied. He said there had been instances of judges adopting such a course.

Where the case of an intending petitioner depends on the presumption under s 218(2)(a) for proof of the debtor company's inability to pay its debts, the petitioner would have no case to bring until the presumption has arisen after the statutory notice has been issued and served and the company has, for three weeks, failed to satisfy the demand of the statutory notice. Until the presumption arises, the intending petitioner would have no cause of action to be qualified to present a petition. It must follow that he would have no course of action to qualify to be substituted as a petitioner under r 33(1). When a petitioner expresses a desire to withdraw his petition,

the respondent company is entitled, were it not for a proposed substitution, to be freed of the petition, and it would not be fair to the company to allow the petition to remain hanging over its head for the sake of enabling another party to qualify for substitution who is known for certain to be not yet qualified.

The crucial words of r 33(1) for present purposes are 'any person who ... would have a right to present the petition'. I wonder whether the definite article 'the' is intentional or whether it should instead be 'a petition', because if 'the' is intentional, then 'the petition' actually refers to the petition that is sought to be withdrawn and the interesting question would then arise as to when a person who intends to be a substitute petitioner can be said to have a right to present the petition that is sought to be withdrawn. The question, however, was not taken up in the brief submission, which did not pay regard to the point, it being, perhaps unconsciously, assumed that 'a petition' was intended.

The only concern on my part, is, therefore, whether the words 'would have', in relation to a right to present a petition, indicates a future qualification. If they are intended to indicate futurity, that would be the only justification for learned counsel for Cutler-Hammer's urging that an order on the withdrawal be deferred until they qualified under s 218(2)(a). In my opinion those words do not indicate futurity. Whether Cutler-Hammer would have the right to present a petition will have to be decided as of the moment.

Learned counsel for Cutler-Hammer cited the Privy Council's judgment in *Perak Pioneer Ltd v Petroliam Nasional Bhd* [1986] 3 WLR 105 at p 112C-G, where the Privy Council analysed r 33 of the Companies (Winding-up) Rules of Hong Kong, although not identical, corresponds with our r 33 where the right of the intending substitute to present is expressed to be 'a petition'. The Privy Council in that case were not concerned with the question whether substitution could be ordered where the party seeking substitution would not have a right to present a petition until sometime in the future but whether it could be ordered where the party seeking substitution was not a creditor when the existing petition was presented. The judgment, therefore, does not assist Cutler-Hammer. I do, however, find some support there for what I have said about the words 'would have'. From the passage at p 112 G, it may be understood that since the party seeking substitution had a right to present the petition at the date when substitution was sought, he qualified as a person who 'would have a right to present a petition'.

For the reasons that I have given, I do not think I ought to defer making an order on the withdrawal of this petition to enable Cutler-Hammer to issue the statutory notice and qualify for the benefits of s 218(2)(a).

*Application dismissed.*

Reported by Joel Ng